

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

FORD MOTOR CREDIT COMPANY,

Plaintiff,

v.

NO. CIV. S-04-2344 LKK/JFM

MICHAEL DAUGHERTY,

Defendant.

\_\_\_\_\_  
AND RELATED COUNTER-CLAIM AND  
THIRD-PARTY COMPLAINT.  
\_\_\_\_\_

Pending before the court are two motions for summary judgment, one filed by plaintiff and counter-defendant, Ford Motor Credit Company ("Ford Credit"), and one filed third-party defendant Ford Motor Company, Lincoln Mercury Division ("Lincoln Mercury").

In the underlying suit, Ford Credit brings two breach of guaranty claims against defendant Michael Daugherty ("Daugherty") regarding a wholesale agreement and a capital loan agreement and promissory note. Ford Credit asserts that Daugherty induced it to enter into these agreements by promising full payment, but that

1 Daugherty subsequently breached these guaranty agreements.  
2 Daugherty answered and filed a counterclaim against Ford Credit.  
3 Daugherty and Daugherty Lincoln-Mercury Inc. ("DLMI") also brought  
4 a third-party suit against Lincoln Mercury.<sup>1</sup>

5 **I.**

6 **FACTS<sup>2</sup>**

7 In 1999, Daugherty acquired a Lincoln Mercury dealership to  
8 be operated in Sacramento, California. Lincoln Mercury SUF 1.  
9 During the course of operations, DLMI entered into various  
10 financing arrangements with Ford Credit including an agreement for  
11 a capitalization loan and a separate agreement for wholesale  
12 flooring for DLMI's new vehicle inventory. Ford Credit SUF 4. In  
13 consideration of Ford Credit's agreement to finance DLMI's  
14 acquisition of vehicles, and to secure DLMI's obligations under the  
15 Wholesale Agreement owed to Ford Credit, DLMI granted Ford Credit  
16 a security interest in all vehicles. Ford Credit SUF 5. In 2001,

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18 <sup>1</sup> The parties are well aware of the litigation history in  
19 this case. Rather than provide a long and detailed account of the  
litigation up to this point, the court incorporates by reference  
pages 2-3 of the court's February 23, 2006 order.

20 <sup>2</sup> Facts are undisputed unless otherwise noted. Although  
21 Daugherty and DLMI disputed some of the facts asserted by Ford  
Credit and Lincoln Mercury, Daugherty and DLMI failed to offer any  
22 evidence showing that there is a disputed fact. Instead, Daugherty  
and DLMI cited to their Fourth Amended Answer, Counterclaim and  
23 Third-Party Complaint. This pleading has not been verified. It  
is well established that a party opposing a motion for summary  
24 judgment may not rest upon allegations contained in a pleading.  
Rather, the party must present admissible evidence showing that  
25 there is a genuine issue for trial. See Fed. R. Civ. P. 56(e).  
Because Daugherty and DLMI present no such evidence, the court  
26 accepts as true the facts set forth by Ford Credit and Lincoln  
Mercury.

1 DLMI became unable to meet its contractual payment obligations  
2 under the Wholesale Agreement and the Capital Loan Agreement to  
3 Ford Credit. Ford Credit SUF 7. In December 2001, DLMI ceased to  
4 conduct business and voluntarily surrendered the remaining nine  
5 vehicles in its inventory to Ford Credit. Ford Credit SUF 8.

6 As of February 28, 2002, DLMI owed Ford Credit a deficiency  
7 balance under the Wholesale Agreement of \$108,093.25. Ford  
8 Credit SUF 11. Interest accrued at a variable rate as set forth  
9 in the Wholesale Agreement. Interest accrued on the principal  
10 balance from February 28, 2002, through March 31, 2006, in the  
11 aggregate sum of \$43,925.84. Interest will continue to accrue at  
12 the contract rate until entry of judgment. SUF 12.<sup>3</sup> DLMI has paid  
13 no amount of these deficiency balances. Ford Credit SUF 13.

14 With respect to Lincoln Mercury, DLMI and Daugherty allege in  
15 their counterclaim that representatives of Lincoln Mercury made  
16 representations containing inflated estimates of potential sales  
17 of new Lincoln Mercury vehicles that DLMI could expect in the  
18 Sacramento market. Lincoln Mercury SUF 2. Daugherty claims that  
19 he relied upon the representations of Lincoln Mercury in making his  
20 decision to acquire the Lincoln Mercury dealership. Lincoln  
21 Mercury SUF 3.

22 DLMI and Daugherty allege that during several meetings,  
23 representatives from Lincoln Mercury re-confirmed the earlier  
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25 <sup>3</sup> Daugherty and DLMI object to Ford Credit's SUF 11 and 12,  
26 yet fail to offer any evidence that establishes that these specific  
facts are in dispute.

1 representations containing inflated estimates of potential sales  
2 of new Lincoln Mercury vehicles that DLMI could expect to make in  
3 the Sacramento market. Lincoln Mercury SUF 8. Daugherty claims  
4 he relied upon those representations in ordering vehicles and DLMI  
5 consequently became vastly overstocked with inventory. Lincoln  
6 Mercury SUF 9. By June 2000, Daugherty and DLMI allege they had  
7 over \$7,600,000 in inventory, which they contend was  
8 disproportionate to the normal inventory volume in the industry.  
9 Lincoln Mercury SUF 10.

10 It is undisputed that in December of 2001 DLMI closed its  
11 business and in January of 2001, Lincoln Mercury sent a letter to  
12 DLMI notifying DLMI of its intent to terminate the franchise  
13 agreement for failure to conduct business. Lincoln Mercury SUF 11  
14 and 12; Ford Credit SUF 8. DLMI filed a protest with the  
15 California New Motor Vehicle Board ("NMVB"), protesting the  
16 proposed termination of its franchises. Lincoln Mercury SUF 13.

17 **A. THE DECISION OF THE NEW MOTOR VEHICLE BOARD**

18 An evidentiary hearing on the protest was held January 7 and  
19 January 9, 2003 before an administrative law judge. Lincoln  
20 Mercury SUF 14. The NMVB adopted the decision of the  
21 administrative law judge on April 24, 2003. Lincoln Mercury SUF  
22 15. The ALJ made several findings of fact. First, the ALJ  
23 determined that Daugherty did in fact order the additional cars to  
24 sell (a fact DLMI contests in this litigation). Specifically, the  
25 ALJ concluded that there was no doubt that Daugherty was aware that  
26 the vehicles were being ordered to be built and delivered and that

1 Daugherty not only desired them but required them in order to stay  
2 operational. NMVB Decision at 24. Second, the ALJ concluded that  
3 Lincoln Mercury had "established that Daugherty was not and is not  
4 conducting an adequate amount of business as compared to the  
5 business available to it." Id. at 26. The ALJ explicitly stated  
6 that "the cessation of business by Daugherty was not caused by  
7 conduct of representatives of Lincoln Mercury." Id. at 27.

8 **II.**

9 **STANDARD FOR MOTIONS FOR SUMMARY JUDGMENT**

10 Summary judgment is appropriate when it is demonstrated that  
11 there exists no genuine issue as to any material fact, and that the  
12 moving party is entitled to judgment as a matter of law. Fed. R.  
13 Civ. P. 56(c); See also Adickes v. S.H. Kress & Co., 398 U.S. 144,  
14 157 (1970); Sicor Limited v. Cetus Corp., 51 F.3d 848, 853 (9th  
15 Cir. 1995).

16 Under summary judgment practice, the moving party

17 [A]lways bears the initial responsibility of  
18 informing the district court of the basis for  
19 its motion, and identifying those portions of  
20 "the pleadings, depositions, answers to  
21 interrogatories, and admissions on file,  
together with the affidavits, if any," which  
it believes demonstrate the absence of a  
genuine issue of material fact.

22 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). "[W]here the  
23 nonmoving party will bear the burden of proof at trial on a  
24 dispositive issue, a summary judgment motion may properly be made  
25 in reliance solely on the 'pleadings, depositions, answers to  
26 interrogatories, and admissions on file.'" Id. Indeed, summary

1 judgment should be entered, after adequate time for discovery and  
2 upon motion, against a party who fails to make a showing sufficient  
3 to establish the existence of an element essential to that party's  
4 case, and on which that party will bear the burden of proof at  
5 trial. See id. at 322. "[A] complete failure of proof concerning  
6 an essential element of the nonmoving party's case necessarily  
7 renders all other facts immaterial." Id. In such a circumstance,  
8 summary judgment should be granted, "so long as whatever is before  
9 the district court demonstrates that the standard for entry of  
10 summary judgment, as set forth in Rule 56(c), is satisfied." Id.  
11 at 323.

12 If the moving party meets its initial responsibility, the  
13 burden then shifts to the opposing party to establish that a  
14 genuine issue as to any material fact actually does exist.  
15 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,  
16 586 (1986); See also First Nat'l Bank of Ariz. v. Cities Serv. Co.,  
17 391 U.S. 253, 288-89 (1968); Sicor Limited, 51 F.3d at 853.

18 In attempting to establish the existence of this factual  
19 dispute, the opposing party may not rely upon the denials of its  
20 pleadings, but is required to tender evidence of specific facts in  
21 the form of affidavits, and/or admissible discovery material, in  
22 support of its contention that the dispute exists. Fed. R. Civ.  
23 P. 56(e); Matsushita, 475 U.S. at 586 n.11; See also First Nat'l  
24 Bank, 391 U.S. at 289; Rand v. Rowland, 154 F.3d 952, 954 (9th Cir.  
25 1998). The opposing party must demonstrate that the fact in  
26 contention is material, i.e., a fact that might affect the outcome

1 of the suit under the governing law, Anderson v. Liberty Lobby,  
2 Inc., 477 U.S. 242, 248 (1986); Owens v. Local No. 169, Assoc. of  
3 Western Pulp and Paper Workers, 971 F.2d 347, 355 (9th Cir. 1992)  
4 (quoting T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n,  
5 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is genuine,  
6 i.e., the evidence is such that a reasonable jury could return a  
7 verdict for the nonmoving party, Anderson, 477 U.S. 248-49; see  
8 also Cline v. Industrial Maintenance Engineering & Contracting Co.,  
9 200 F.3d 1223, 1228 (9th Cir. 1999).

10 In the endeavor to establish the existence of a factual  
11 dispute, the opposing party need not establish a material issue of  
12 fact conclusively in its favor. It is sufficient that "the claimed  
13 factual dispute be shown to require a jury or judge to , 04-  
14 1993 resolve the parties' differing versions of the truth at trial."  
15 First Nat'l Bank, 391 U.S. at 290; See also T.W. Elec. Serv., 809  
16 F.2d at 631. Thus, the "purpose of summary judgment is to 'pierce  
17 the pleadings and to assess the proof in order to see whether there  
18 is a genuine need for trial.'" Matsushita, 475 U.S. at 587  
19 (quoting Fed. R. Civ. P. 56(e) advisory committee's note on 1963  
20 amendments); see also International Union of Bricklayers & Allied  
21 Craftsman Local Union No. 20 v. Martin Jaska, Inc., 752 F.2d 1401,  
22 1405 (9th Cir. 1985).

23 In resolving the summary judgment motion, the court examines  
24 the pleadings, depositions, answers to interrogatories, and  
25 admissions on file, together with the affidavits, if any. Rule  
26 56(c); See also In re Citric Acid Litigation, 191 F.3d 1090, 1093

1 (9th Cir. 1999). The evidence of the opposing party is to be  
2 believed, see Anderson, 477 U.S. at 255, and all reasonable  
3 inferences that may be drawn from the facts placed before the court  
4 must be drawn in favor of the opposing party, see Matsushita, 475  
5 U.S. at 587 (citing United States v. Diebold, Inc., 369 U.S. 654,  
6 655 (1962) (per curiam)). Nevertheless, inferences are not drawn  
7 out of the air, and it is the opposing party's obligation to  
8 produce a factual predicate from which the inference may be drawn.  
9 See Richards v. Nielsen Freight Lines, 602 F. Supp. 1224, 1244-45  
10 (E.D. Cal. 1985), aff'd, 810 F.2d 898, 902 (9th Cir. 1987).

11 Finally, to demonstrate a genuine issue, the opposing party  
12 "must do more than simply show that there is some metaphysical  
13 doubt as to the material facts. . . . Where the record taken as a  
14 whole could not lead a rational trier of fact to find for the  
15 nonmoving party, there is no 'genuine issue for trial.'" Matsushita, 475 U.S. at 587 (citation omitted).

### 17 **III.**

#### 18 **ANALYSIS**

19 Ford Credit and Lincoln Mercury move for summary judgment as  
20 to all the remaining claims. Ford Credit and Lincoln Mercury argue  
21 that the applicable statutes of limitations bar each of the claims  
22 raised by Daugherty and DLMI. Ford Credit also argues that there  
23 are no genuine issues of fact with respect to its breach of  
24 guaranty claims against Daugherty.

25 Daugherty and DLMI oppose both motions for summary judgment  
26 and argue that the existence of disputed facts preclude summary



1 judgment as to all the claims at issue.

2 As a threshold matter, the court notes that Daugherty and DLMI  
3 failed to tender any evidence of specific facts that would support  
4 their contentions that factual disputes remain. Although Daugherty  
5 and DLMI disputed several facts and factual conclusions alleged by  
6 the moving parties, they did not submit any declarations,  
7 depositions, or any other type of admissible evidence that would  
8 establish a disputed fact. DLMI and Daugherty only cite to their  
9 own Fourth Amended Answer and Counterclaim, and not to any  
10 admissible evidence. This is improper.

11 It is well established that:

12 In attempting to establish the existence of this factual  
13 dispute, the opposing party may not rely upon the  
14 denials of its pleadings, but is required to tender  
15 evidence of specific facts in the form of affidavits,  
and/or admissible discovery material, in support of its  
contention that the dispute exists.

16 Fed. R. Civ. P. 56(e). Here, DLMI and Daugherty have not tendered  
17 any evidence of specific facts that support their contention that  
18 factual disputes exist. For this reason and for the reasons  
19 explained below, the court grants both motions for summary  
20 judgment.

21 **A. CLAIMS PERTAINING TO FORD CREDIT**

22 **1. Claims brought by Ford Credit Against Daugherty**

23 Ford Credit brings two claims for relief against DLMI: breach  
24 of the wholesale agreement and breach of the capital loan  
25 agreement. With respect to both claims, Ford Credit alleges that  
26 DLMI and Ford Credit entered into two contracts, a wholesale

1 agreement as well as a capital loan agreement. Ford Credit claims  
2 it performed all of its obligations under these agreements and DLMI  
3 breached the agreements by failing to pay Ford Credit according the  
4 terms of the agreements.

5 Daugherty and DLMI argue that "genuine issues of material  
6 fact" still remain. Daugherty & DLMI Opp'n at 8:16. Despite this  
7 statement, Daugherty and DLMI fail to tender any evidence that  
8 establishes that there is a genuine issue for trial. To the extent  
9 that Daugherty and DLMI dispute Ford Credit's factual allegations,  
10 they cite only to their Fourth Amended Answer, an unverified  
11 pleading. As discussed previously, a nonmoving party may not rest  
12 upon unverified allegations in its complaint as a grounds to defeat  
13 summary judgment. See Fed. R. Civ. P. 56(e).

14 Moreover, Daugherty and DLMI fail to tender any evidence as  
15 to the affirmative defenses raised in their initial answer to Ford  
16 Credit's complaint. It is well settled that a motion for summary  
17 judgment should be granted against a party who fails to make a  
18 showing sufficient to establish the existence of an element  
19 essential to that party's case and on which that party will bear  
20 the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S.  
21 317, 322 (1986). "There can be 'no genuine issue as to any  
22 material fact,' since a complete failure of proof concerning an  
23 essential element of the nonmoving party's case necessarily renders  
24 all other facts immaterial." Id. at 323.

25 For these reasons, Ford Credit's motion for summary judgment  
26 as to its claims for breach of guaranty must be granted.

1           **2. DLMI & Daugherty's claim against Ford Credit**

2           Following the court's February 27, 2006 order, the only  
3 remaining claim against Ford Credit is a claim for negligent  
4 misrepresentation. Ford Credit argues that this claim is barred  
5 by the applicable statute of limitations. Daugherty and DLMI  
6 maintain that disputed facts remain.

7           Negligent misrepresentation is a form of fraud. Balfour,  
8 Guthrie & Co. v. Hansen, 227 Cal. App.2d 173, 192 (Cal. App. 1964).  
9 The applicable statute of limitations for a claim of fraud is three  
10 years. Cal. Civ. Proc. Code § 338. Under section 338, the cause  
11 of the action is deemed to have accrued when the aggravated party  
12 discovers the facts constituting the fraud or mistake. Id.

13          Ford Credit alleges DLMI and Daugherty should have known of  
14 the potential claim for fraud no later than June 2000. In June of  
15 2000, the inventory of new vehicles at DLMI had risen to over  
16 \$7,600,000, which was in excess of the \$2,000,000 credit line  
17 amount from Ford Credit. See Decision of the NMVB at 15:24-28.  
18 Ford Credit claims that this was when DLMI and Daugherty should  
19 have discovered the facts constituting the fraud.

20          DLMI and Daugherty fail to address the statute of limitations  
21 issue in their opposition and instead argue that disputed facts  
22 remain as to the claim of negligent misrepresentation. Once again,  
23 however, Daugherty and DLMI fail to tender any evidence that  
24 supports their contention that disputed facts remain. Instead,  
25 Daugherty and DLMI cite to their Fourth Amended Answer and  
26 Counterclaim.

1 Since Daugherty and DLMI have failed to establish the  
2 existence of a disputed fact, the court accepts as true the facts  
3 tended by Ford Credit. Under the facts as presented by Ford  
4 Credit, DLMI and Daugherty should have discovered the alleged  
5 misrepresentation no later than June 2000. Therefor, DLMI and  
6 Daugherty had three years from June 2000 to file a claim for  
7 negligent misrepresentation. The claim for negligent  
8 misrepresentation was not raised until March 21, 2005, when DLMI  
9 and Daugherty filed their Second Amended Answer and Counterclaim.  
10 The claim is therefore barred under the applicable statute of  
11 limitations.

12 For this reason, Ford Credit's motion for summary judgment as  
13 to DLMI and Daugherty's claim for negligent misrepresentation must  
14 be granted.

15 **B. CLAIMS PERTAINING TO LINCOLN MERCURY**

16 **1. Breach of Implied Covenant of Good Faith & Unfair**  
17 **Business Practices**

18 Daugherty and DLMI allege that Lincoln Mercury violated the  
19 covenant of good faith and fair dealing of the franchise agreements  
20 and engaged in unfair business practices when Lincoln Mercury made  
21 false representations as to the sales potential in the Sacramento  
22 area.<sup>4</sup> Lincoln Mercury argues that these claims are barred by the  
23 applicable statute of limitations. Daugherty and DLMI assert that  
24 the existence of disputed facts preclude summary judgement.

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25 <sup>4</sup> These were the second and third claims in DLMI and  
26 Daugherty's second amended answer and counterclaim.

1 The applicable statute of limitations for both actions is four  
2 years. See Cal. Civ. Proc. Code § 337(1) (breach of implied  
3 covenant of good faith and fair dealing) and Cal. Bus. & Prof. Code  
4 § 17208 (unfair business practices). Lincoln Mercury argues that  
5 by DLMI's own factual allegations contained in their complaint,  
6 Daugherty and DLMI's claim accrued by June 2000. In June of 2000,  
7 DLMI was overstocked with an inventory of \$7,600,000, far in excess  
8 of their 2,000,000.00 credit line.<sup>5</sup> At this point, Lincoln  
9 Mercury contends, DLMI should have been aware of the alleged  
10 misrepresentations made by Lincoln Mercury.

11 DLMI and Daugherty maintain that "what DLMI knew, and when it  
12 knew it, with regard to the instant claim has never been factually  
13 determined or litigated." Daugherty & DLMI Opp'n at 9:20-21. Once  
14 again, however, Daugherty and DLMI fail to tender any evidence that  
15 supports their contention that disputed facts remain.

16 Since Daugherty and DLMI failed to establish the existence of  
17 a disputed fact, the court accepts as true the facts tended by  
18 Lincoln Mercury. Under the facts as presented by Lincoln Mercury,  
19 DLMI and Daugherty should have discovered the alleged  
20 misrepresentation no later than June 2000. Therefore, DLMI and  
21 Daugherty had four years from June 2000 to file a claim for breach  
22 of implied covenant of good faith and fair dealing as well as a  
23 claim for unfair business practices. However, these claims were  
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25 <sup>5</sup> The fact that DLMI was overstocked in June of 2000 and was  
26 over the approved credit line is also verified in the decision of  
the Motor Vehicle Board.

1 not raised until January 6, 2005, when DLMI and Daugherty filed  
2 their First Amended Answer and Counterclaim. The claims are  
3 therefore barred under the applicable statute of limitations.

4 For this reason, Lincoln Mercury's motion for summary judgment  
5 as to DLMI's claim for breach of implied covenant of good faith and  
6 fair dealing as well as for the claim of unfair business practices  
7 must be granted.

8 **2. Misrepresentation-Deceit-Fraud & Negligent**  
9 **Misrepresentation**

10 Daugherty and DLMI allege that Lincoln Mercury misled DLMI as  
11 to the number of vehicles it could sell and that DLMI became a  
12 Lincoln Mercury dealer because of these misrepresentations.<sup>6</sup>

13 As discussed in section A (2) of this order, these claims are  
14 all a form of fraud. The applicable statute of limitations for a  
15 claim of fraud is three years. Cal. Civ. Proc. Code § 338. Under  
16 section 338, the cause of the action is deemed to have accrued when  
17 the aggravated party discovers the facts constituting the fraud or  
18 mistake. Id.

19 Lincoln Mercury alleges DLMI and Daugherty should have known  
20 of the potential claim for fraud no later than June 2000. In June  
21 of 2000, the inventory of new vehicles at DLMI had risen to over  
22 \$7,600,000, which was in excess of the \$2,000,000 credit line  
23 amount from Ford Credit. See Decision of the NMVB at 15:24-28.

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25 <sup>6</sup> These constituted claims six and seven of Daugherty and  
26 DLMI's third answer and amended complaint.

1 Lincoln Mercury claims that this was when DLMI and Daugherty should  
2 have discovered the facts constituting the fraud.

3 Daugherty and DLMI argue that there remain disputed issues of  
4 fact as to the claims for fraud, and yet fail to tender any  
5 evidence to support this contention. For the reasons already  
6 discussed, the court accepts as true the facts as set forth by  
7 Lincoln Mercury.

8 The claim for misrepresentation-deceit-fraud was filed on  
9 January 6, 2005 and the claim for negligent misrepresentation was  
10 filed on March 21, 2005. These claims are both, therefore, barred  
11 under the applicable statute of limitations. For these reasons,  
12 Lincoln Mercury's motion for summary judgment with respect to the  
13 claim for misrepresentation-deceit-fraud as well to the claim for  
14 negligent misrepresentation must be granted.

15 **V.**

16 **ORDERS**

17 Ford Credit and Lincoln Mercury's motions for summary judgment  
18 as to DLMI and Daugherty is GRANTED in full. The Clerk is directed  
19 to ENTER judgment accordingly and CLOSE the case.

20 IT IS SO ORDERED.

21 DATED: May 1, 2006.

22 /s/Lawrence K. Karlton  
23 LAWRENCE K. KARLTON  
24 SENIOR JUDGE  
25 UNITED STATES DISTRICT COURT  
26